No. 366

Supreme Court of the United States

OCTOBER TERM, 1923.

THE STATE OF WASHINGTON,
Plaintiff in Error,

v.

W. C. DAWSON & COMPANY, a corporation,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF AMICUS CURIAE

ALFRED J. SCHWEPPE,
Amicus Curiae.

Office and Postoffice Address:
1702 L. C. Smith Building, Seattle, Wash.

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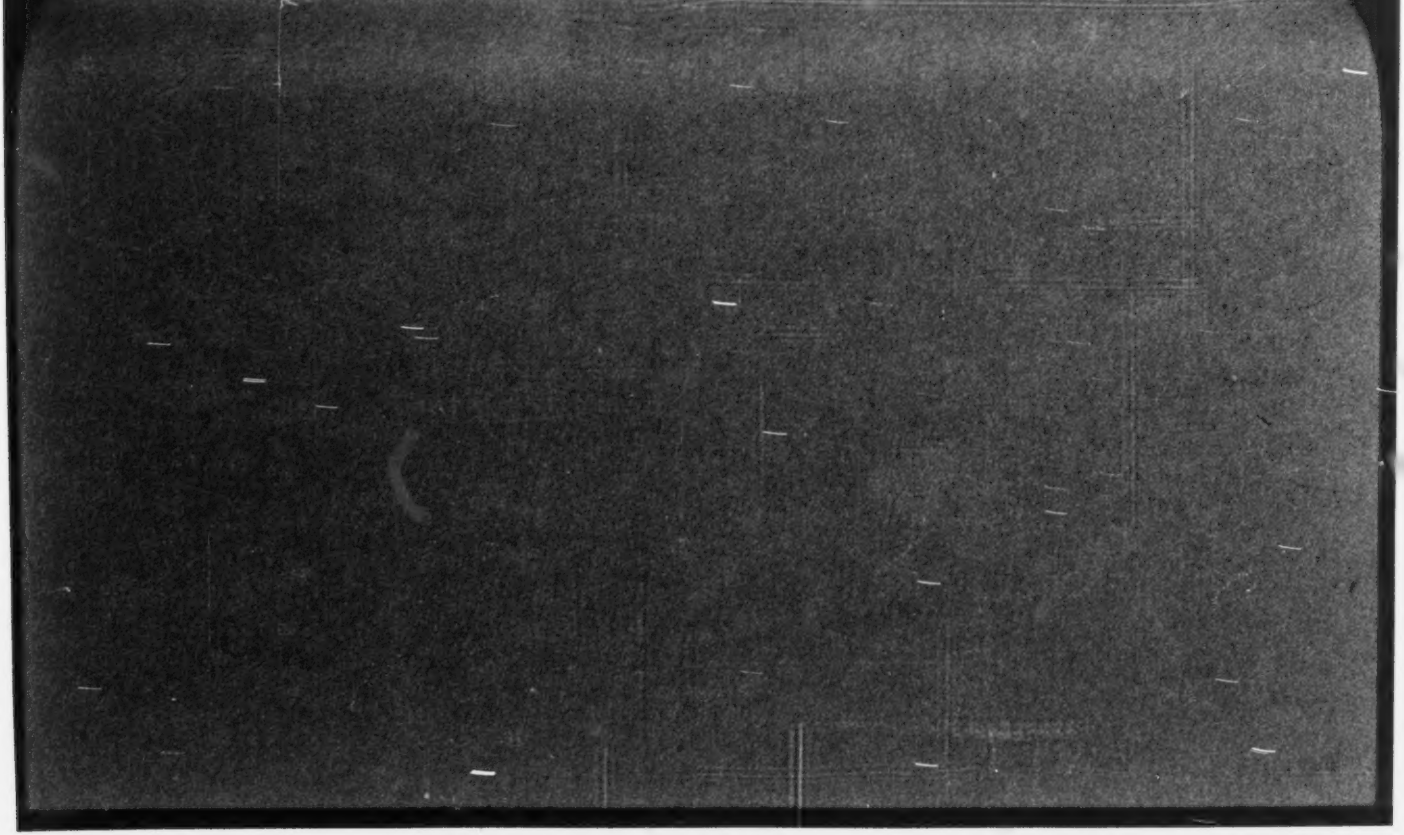

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STATEMENT OF THE CASE

This action was brought by the state of Washington, the plaintiff in error, to collect premiums under the workmen's compensation act of the state of Washington from the defendant in error, a corporation which employs stevedores to stow away cargoes in ships lying upon the waters of Puget Sound, which are navigable waters of the United States within the boundaries of the state of Washington. This action directly calls in question the constitutionality of the act of Congress of June 10, 1922, amending sections 24 and 256 of the Judicial Code and saving to maritime claim-

ants (other than the master and the crew of a vessel) their rights and remedies under the workmen's compensation act of any state and depriving the federal district courts of jurisdiction in those cases. In holding that the trial court correctly sustained the demurrer to the complaint and, on refusal of the plaintiff to plead further, properly dismissed the action, the supreme court of the state of Washington ruled that the act of Congress was unconstitutional. *State of Washington v. W. C. Dawson & Co.*, 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059. The case is here on writ of error.

ARGUMENT

The determination of this cause involves (1) the ascertainment of the true boundary line for state legislation in the field of admiralty apart from acts of Congress, as that line is at present established by the decisions of this Court, and (2) the power of Congress to enlarge the present sphere of state legislation in admiralty and maritime matters by withdrawing certain classes of cases from the jurisdiction of the district courts of the United States. While these questions may thus, for convenience be separately stated, the determination of the first is practically conclusive of the second.

In the case of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, this Court held unconstitutional an act of Congress saving to maritime suitors their remedies under the workmen's compensation act of any state. Since the decision in the case of *Knickerbocker Ice Co v. Stewart*, this Court has made important decisions bearing on the issues here involved, in *Western Fuel Co. v. Garcia*, 257 U. S. 233; in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469; in *State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263; and in *Great Lakes Dredge and Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, p. 490.

In the present case it cannot be seriously contended that the case of *Knickerbocker Ice Co. v.*

Stewart, 253 U. S. 149, is not controlling, unless that decision has in some way been impliedly modified by the decision in the case of *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, which is discussed at length in the briefs of both plaintiff in error and defendant in error. It is the contention of the plaintiff in error that the *Knickerbocker Ice Co.* case has been modified by the *Rohde* case to the extent of sustaining the act of Congress here involved. (See Brief of Plaintiff in Error, p. 15). Therefore, the ascertainment of the true principle of the *Rohde* case will be largely determinative of this action. The questions above propounded will now be discussed in their order.

I.

The Boundary Line for State Legislation in the Field of Admiralty Law, Apart From Acts of Congress, is Fixed in the Case of Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469.

The boundary line for state legislation in the field of admiralty law, apart from acts of Congress, can best be fixed by the ascertainment of the true principle on which the *Rohde* case (257 U. S. 469) is based, because that case at the present time concededly constitutes the outpost of state jurisdiction.

Rohde was injured while working as a carpenter on an uncompleted ship which had just

been launched in the navigable waters of the Willamette River at Portland, Oregon. Rohde began an action in the United States district court for the district of Oregon, sitting in admiralty, to recover damages for the negligence of the Grant Smith-Porter Ship Company. The Oregon Workmen's Compensation Act applied to hazardous occupations, including shipbuilding within the state of Oregon and prescribed the exclusive remedy for injuries sustained in such occupations. The Ship Company interposed the compensation statute as a defense, but the defense was not allowed (259 Fed. 304; 263 Fed. 304), and Rohde recovered judgment. When the case reached the Circuit Court of Appeals for the Ninth Circuit, it certified to the United States Supreme Court two questions, which as construed by the Supreme Court are as follows: (1) "Whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state"; (2) "whether, in the circumstances stated, the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court, which otherwise would exist." Both questions were answered by the Supreme Court of the United States in the affirmative, with the result, of course, that Rohde's recovery in the federal district court was

set aside, and he was obliged to take his award under the compensation act.

(A) THE ROHDE CASE ANNOUNCES THE PRINCIPLE THAT THE STATES MAY LEGISLATE AS TO LOCAL MATTERS IN THE FIELD OF ADMIRALTY LAW.

The *Rohde* case (257 U. S. 469, 66 L. Ed. 321) is not based on the so-called elective or contractual feature of the Oregon compensation act, as seems to be contended by the defendant in error (See Brief of Defendant in Error, pp. 16-17), but rests squarely on the *principle* that, while state legislation may not affect admiralty jurisdiction as to matters characteristically maritime, still *state legislation may affect admiralty jurisdiction as to local matters.* That *principle* is expressly enunciated in the *Rohde* case itself, the court saying as follows (66 L. Ed. 321, 324):

> "In *Western Fuel Co. v. Garcia* we recently pointed out, that *as to certain local matters*, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by *state statutes. The present case is controlled by that principle.*" (Italics ours).

There we have an unqualified statement of the *principle* controlling the *Rohde* case, viz., that *state statutes* may modify or supplement the general admiralty law as to certain *local* matters.

The *principle* on which the *Rohde* case is based reaches far back into the history of American admiralty law. See *Cooley v. Port Wardens*, (1851) 12 How. (U. S.) 299, 13 L. Ed. 996. It is fully discussed in the opposing opinions of Justice McReynolds for the majority and Holmes and Pitney for the dissenting justices in the leading case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205 61 L. Ed. 1086, 37 Sup. Ct. Rep. 524, L. R. A. 1918 C. 451, Ann. Cas. 1917 E. 900, the extent of that doctrine being the ground of the 5-4 division of the court in that case. Mr. Justice McReynolds, writing the majority opinion, recognized that the general maritime law

> "may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."

The majority concluded, however, that the case before the court was beyond the scope of state legislation. The dissenting justices, after an exhaustive review of the authorities, took the view that the matter was within the power of the states.

In *Western Fuel Co. v. Garcia*, 257 U. S. 233, 66 L. Ed. 210, the unanimous court, relying on the same cases as cited by the dissenting judges in *Southern Pacific v. Jensen*, *supra*, held that where death follows from a maritime tort committed on navigable waters within a state having a wrongful death statute, the federal courts, sitting

in admiralty (which, like the common law, knows no action for wrongful death), will entertain a libel *in personam* for the damages sustained from a wrongful death by those to whom such right is given. Mr. Justice McReynolds, who has written virtually all of the modern opinions on this question, said as follows (66 L. Ed. 210, 213):

> "How far this rule of non-liability adopted and enforced by our admiralty courts in the absence of an applicable statute, may be modified changed or supplemented by state legislation has been the subject of consideration here, but no complete solution of the question has been announced."

Then after a review of the United States Supreme Court cases permitting state legislation as to maritime matters local in their nature, he concludes (66 L. Ed. 210, 214):

> "The subject is *maritime and local* in character, and the specified modification of, or supplement to, the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." (Italics ours).

The next case, decided only a month after *Western Fuel Co. v. Garcia*, is the *Rohde* case, where the court announces the *principle* of the

case in the language which has already been set out above, but which for the sake of historical continuity is here repeated:

> "In *Western Fuel Co. v. Garcia*, we recently pointed out that, as to certain *local matters* regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. *The present case is controlled by that principle.*" (Italics ours).

That such is the true principle of the *Rohde* case is again pronounced in the later case of *State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263, 66 L. Ed. 933, where the court says (66 L. Ed. 933, 937):

> "In *Grant Smith-Porter Ship Co. v. Rohde*, a carpenter proceeding in admiralty sought damages for injuries received while at work on a partially completed vessel lying in the Willamette River. The Oregon workmen's compensation law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable waters and the cause of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the work-

> man's activities at the time had any direct relation to navigation or commerce. *It was essentially a local matter.*" (Italics ours).

In the still later, and very recent, case of *Great Lakes Dredge and Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, the court expresses the principle of the *Rohde* case as follows:

> "In the cause last cited, neither Rohde's general employment, nor his activities has any direct relation to navigation or commerce; *the matter was purely local*, and we were of the opinion that application of the *state statute*, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity." (Italics ours).

Can there be any doubt, then, as to the *principle* on which the *Rohde* case was decided when that case expressly sets forth and declares the *principle* on which it is based, and when the later decisions confirm that principle, viz., that *state legislation may affect admiralty jurisdiction as to local matters* without impairing the essential uniformity of admiralty law?

The foregoing examination of the cases seems sufficient to demonstrate beyond contradiction that the *Rohde* case was not based on the *fortuitous and incidental circumstance* that the Oregon

compensation act was elective, but on the *principle* that the subject-matter, while perhaps maritime in so far as locality is concerned, was *local* in its nature and *not characteristically maritime* so as to affect the uniformity of the general admiralty law, and that it was, therefore, a fit subject for state legislation. Not only is the elective feature of the statute in the *Rohde* case not stressed in the case itself, but the later cases of *State Industrial Commission v. Nordenholt Corporation, supra*, and *Great Lakes Dredge and Dock Co. v. Kierejewski, supra*, both of which as above shown, restate the *principle* of the *Rhode* case, do not even mention the so-called elective characteristic of the Oregon act, which fact clearly shows that the *incidental feature* was of no moment in the formulation of the *principle* of the decision.

(B) THE SUBJECT-MATTER IN THE ROHDE CASE WAS LOCAL BECAUSE THE SERVICE, EMPLOYMENT, AND CONTRACT WAS NON-MARITIME.

Why was the subject-matter in the *Rohde* case *local* in its nature? The court gives its reasons therefor in these words (66 L. Ed. 321, 324):

> "The *contract* for constructing the 'Ahala' was a non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's *general employment, nor his activi-*

ties at the time had any direct relation to navigation or commerce." (Italics ours).

Then, by way of distinguishing the *Jensen* and other cases, the court continues (66 L. Ed. 321, 325):

> "In each of them the *employment* or *contract* was *maritime* in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity." (Italics ours).

These quotations sufficiently show why the subject-matter in the *Rohde* case was *local.* It was local because, although the injury happened on navigable waters, the subject-matter, viz., the shipbuilding contract, the contract of employment, and the activities at the time, were entirely *non-maritime.*

That the nature of the contract, the employment, and the activities at the time are controlling factors in determining the existence of state jurisdiction in these cases has long been settled and is not an innovation of the *Rohde* case, although at first blush it might seem so.

In *Atlantic Transport Co. v. Imbrovek,* 234 U. S. 52, 58 L. Ed. 1208, the court refused to say whether maritime locality alone, while indispensable, was the exclusive test of admiralty jurisdiction, saying (58 L. Ed. 1208, 1212, 1312):

> "But the petitioners urge that the general

statements which we have cited with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort, apart from the mere place of its occurrence, has been of a maritime character * * *

"We do not find it necessary to enter upon this broad inquiry * * * Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case, the wrong which was the subject of the suit, was, we think, of a maritime nature * * * The libellant was injured on a ship, lying in navigable waters, *and while he was engaged in the performance of a maritime service.* We entertain no doubt that the *service* in loading and stowing of a ship's cargo is of this character * * * If *more* is required than the *locality* of the wrong in order to give the court jurisdiction, the relation of the wrong to *maritime service, to navigation, and to commerce* on navigable waters was quite sufficient." (Italics ours).

In all subsequent cases arising on navigable waters the court, following the lead of this case, has looked not only at the locality of the injury, but also at the nature of the service, employment,

and contract and their relation to navigation and commerce.

In *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 61, L. Ed. 1086, 1099, the court, in denying recovery under the state compensation act for the injury on navigable waters in that case, further found:

> "The *work* of a stevedore, in which the deceased was engaging, is maritime in nature; his *employment* was a maritime contract; the injuries which he received were maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234, U. S. 52, 59, 60, 58 L. Ed. 1208, 1211, 1212, 51 L. R. A. N. S. 1157, 34 Sup. Ct. Rep. 733." (Italics ours).

In *Chelentis v. Luckenbach*, 247 U. S. 372, 62 L. Ed. 1171, the court, after finding that the injury occurred on navigable waters, further found (62 L. Ed. 1171, 1176):

> "The *work* about which petitioner was engaged is maritime in its nature; his *employment* was maritime; the injuries received were likewise maritime; and the parties' rights and liabilities were matters clearly within admiralty jurisdiction. *AtlanticTransport Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 58 L. Ed. 1208, 1211, 1212, 51 L. R. A. N. S.

1157, 34 Sup. Ct. Rep. 733." (Italics ours).

In the *Rohde* case, after describing the circumstances of the injury on an incompleted ship lying in navigable waters, the court stated:

> "The *contract* for constructing the 'Ahala' was non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's *general employment*, nor his *activities at the time* had any *direct relation to navigation or commerce.*" (Italics ours).

Then, by way of distinguishing the *Jensen* and other cases, the court further said in the *Rohde* case:

> "In each of them the *employment and contract* was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity."

In *State Industrial Commission v. Nordenholt Corporation, supra* (259 U. S. 263, 66 L. Ed. 933), the court, speaking of the *Rohde* case, says:

> "Neither the *general employment* contracted for nor the workman's *activities at the time* had any *direct relation to navigation or commerce;* it was essentially a local matter." (Italics ours).

In the most recent utterance of the court on this question (*Great Lakes Dredge & Dock Co. v.*

Kierejewski, supra, U. S. Adv. Ops., May 1, 1923, p. 490, it is again not alone the locality but the maritime nature of the service and employment, viz., repairing a complete vessel afloat (*The Jefferson*, 215 U. S. 130; *New Bedford Dry Dock Co. v. Purdy*, 258 U. S. 96), that is determinative of federal jurisdiction in the case. The court says:

> "While performing *maritime service* to a complete vessel afloat, he [Kierejewski] came to his death upon navigable waters as the result of a tort there committed. * * *
>
> "In the last cause cited, neither Rohde's *general employment, nor his activities* had any direct relation to navigation or commerce; *the matter was purely local*, and we were of the opinion that application of the state statute, as between the parties would not work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity.
>
> "Here the circumstances are very different. *Not only* was the tort committed and effective on navigable waters, *but* the *rights and liabilities* of the parties are matters which have *direct relation to navigation and commerce.*" Citing the *Jensen* and other cases. (Italics ours).

In this latest case, decided but a few months ago, the court says that

> "*not only* was the tort committed on navigable waters, *but* [the contract to repair a complete vessel afloat being maritime], the rights and liabilities of the parties are matters which have a direct relation to navigation and commerce."

Thus the rule of the *Imbrovek* case, *supra* (234 U. S. 52, 58 L. Ed. 1208), viz., that the nature of the service or employment and its relation whether direct or indirect, to navigation or commerce is a criterion as well as the locality of the injury, has been consistently carried through the cases. Can one, after thus seeing the determinative facts and statements of these leading cases placed in juxta-position, safely deny that the nature of the *contract*, the *employment*, and the general *activities* at the time are not controlling just as much as the locality of the injury on navigable waters? Although the court in the *Rohde* case has repeated the general doctrine that in contract matters admiralty jurisdiction depends on the nature of the transaction and in tort matters upon the locality, yet it is only what the court calls it, viz., a "*general* doctrine," and in each tort case arising on navigable waters since the *Imbrovek* case, the court has applied not only the general locality test, but has examined the nature of the *contract*, the *employ-*

ment, and the *activities at the time*, and their *relation to navigation or commerce;* and it will be observed that in each case arising on navigable waters it has been the nature of the *contract*, of the *employment*, or of the *activities at the time* that has been decisive.

It will be noticed that in *Great Lakes Dredge & Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops. May 1, 1923, page 490, the court in order to sustain federal jurisdiction was *compelled* to make a finding of maritime service and employment in addition to maritime locality. Only thus could the *Rohde* case be distinguished. While, therefore, in the *Imbrovek* case the finding of maritime ~~locality~~ employment may have been in a sense voluntary in order to bring the case indisputably within the prior cases and "*clearly* within admiralty jurisdiction" without deciding whether it was necessary to do so or not, still in the *Great Lakes Dredge & Dock Co. v. Kierejewski* that finding became an absolute necessity to prevent the attaching of state jurisdiction under the *Rohde* case. In the *Imbrovek* case, and the subsequent cases heretofore referred to, the finding of the character of service or employment was made in order to show that the case was "*clearly* within admiralty jurisdiction"; in the *Rohde* case that finding became a ground of distinction for the purpose of sustaining state jurisdiction; and in the *Kierejewski* case that finding became an

absolute necessity to sustain federal jurisdiction as opposed to state jurisdiction under the *Rohde* case.

The case of *State Industrial Commission v. Nordenholdt Corporation*, 259 U. S. 263, emphasizes the distinction made in the *Imbrovek* case, to-wit, that locality, while indispensable, is not the exclusive test of federal jurisdiction. In the *Nordenholdt* case the injury occurred on *land* during the performance of a *maritime service.* It was held that the state compensation act applied. It is, of course, plain that federal jurisdiction could not attach for the reason that the indispensable element of locality on navigable waters was missing. *Imbrovek* case.

So far as workmen's compensation acts are concerned, there can be no question now since the decisions in the *Rohde* and *Kierejewski* cases that for an action to be triable in the federal courts, two things must concur: (1) maritime locality, (2) maritime service, employment or contract. If the locality is maritime, but the service is non-maritime, the matter is local and state compensation act applies under the doctrine of the *Rohde* case.

The present state of the law, then, on the relation of state workmen's compensation acts to admiralty law, reveals the following four situations:

(1) Where the injury occurs on *navigable*

waters in the performance of a *maritime service, employment, or contract*, the state compensation act cannot apply because the injury directly affects the uniformity of admiralty law. See

Southern Pac. Co. v. Jensen, 244 U. S. 205;

Great Lakes Dredge & Dock Co. v. Kierejewski, U. S. Adv. Ops., May 1, 1923, p. 490.

(2) Where an injury occurs on *navigable waters* in the performance of a *non-maritime service, employment, or contract*, the state compensation act may apply, because the matter is a local matter and the injury only incidentally affects the uniformity of admiralty law. See

Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469.

(3) Where an injury occurs on *land* during the performance of a *maritime service, employment, or contract* the state workmen's compensation act applies, because in that locus there is no possible conflict with admiralty law, since the element of locality on navigable waters which under the *Imbrovek* case is indispensable to federal jurisdiction, is missing. See

State Industrial Commission v. Nordenholt Corp., 259 U. S. 263.

(4) Where an injury occurs on *land* in the performance of a *non-maritime service, employment, or contract* the state compensation act ap-

plies, because such cases are always concededly within state jurisdiction.

It must be borne in mind that the struggle in recent years has constantly been to extend the jurisdiction of state compensation acts into the field of admiralty, and that thus far this effort has been successful only as to local matters where admiralty is incidentally affected. See

Southern Pac. Co. v. Jensen, 244 U. S. 205;

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149;

Western Fuel Co. v. Garcia, 257 U. S. 233;

Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469.

(C) THE ROHDE CASE DOES NOT AND CANNOT REST ON THE ALLEGED CONTRACTUAL FEATURE OF THE OREGON COMPENSATION ACT.

It remains to notice the argument of the defendant in error that the *Rohde* case is based upon the so-called elective feature of the Oregon compensation act, and that under a so-called compulsory compensation act, such as the Washington act, a different result must obtain.

This contention is erroneous for three reasons: (1) all the subsequent cases in this court which restate the principle on which the *Rohde* case is decided, do not even mention the so-called elec-

tive characteristic of the Oregon statute, but refer only to the nature of the service, employment, and contract; (2) parties cannot by contract extend the jurisdiction of a court or the scope of a statute; and (3) there is no inherent difference between a so-called "elective" and so-called compulsory compensation act, for the reason that in a so-called "elective" act all the elements of compensation are present and the elements of voluntary contract absent.

(1) *All Subsequent Cases in This Court Which Restate the Principle on Which the Rohde Case Was Decided Do Not Mention the So-called Elective Feature of the Oregon Act.*
feature of the Oregon act.

Not only is the elective feature not stressed in the *Rohde* case itself, but the later cases of *State Industrial Commission v. Nordenholdt Corporation, supra,* and *Great Lakes Dredge & Dock Co. v. Kierejewski, supra,* both of which, as above shown, restate the principle of the *Rohde* case, do not even mention the so-called elective characteristic of the Oregon act, which fact clearly shows that that *incidental feature* was of no moment in the formulation of the *principle* of the decision. These subsequent cases discuss only the character of the service, employment and contract.

(2) *Parties Cannot by Contract Extend the Jurisdiction of a Court or the Scope of a State.*

Second, parties cannot by contract extend the jurisdiction of a court or the scope of a statute to a situation or locality which, in the absence of the contract, would not be within the jurisdiction of the court or the scope of the statute.

Re Winn, 213 U. S. 458, 53 L. Ed. 873;
U. S. v. Mayer, 235 U. S. 55, 59 L. Ed. 129;
7 R. C. L. 1039;
15 C. J. 802.

This being the universal doctrine, the *Rohde* case cannot rest on the proposition that by contract the parties extended the scope of the statute to a situation and a subject-matter which, apart from contract, would not have been covered by the statute. The Oregon legislature extended the scope of the statute to include the situation by placing shipbuilding operations under the act, and the parties merely came within the existing scope as delineated by the legislature.

The argument that there is a ground for distinguishing the Rohde case because of the so-called elective feature of the Oregon statute has already been refuted in a recent decision of the supreme court of the state of Washington. *Zahler v. Department of Labor and Industries*, 217 Pac. 55. In that case the facts were for all practical purposes identical with the facts in the *Rohde* case and the Washington court was

squarely faced with the question whether the alleged difference between a so-called elective and a so-called compulsory compensation act compelled a different result on a like state of facts. In an exhaustive opinion the court concluded that on principle the result must be the same, although in order to reach this result the court changed the view it had theretofore taken of the *Rohde* case in its decision in *State of Washington v. W. C. Dawson & Co.*, 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059, which is the present case below.

The defendant in error argues that Rohde was allowed to recover under the state act because he had contracted away his right to proceed in the federal court in admiralty. The defendant in error says (Brief p. 17):

> "Under this implied contract Rohde in effect agreed not to bring any suit in the district court or in any other court, for the recovery of damages which he might sustain, but on the contrary to content himself with such an award as might be given by the state compensation officials."

The answer to this argument is that the mere alleged ~~contract~~ agreement of the workman to give up a right to sue in admiralty would still not bring him within the scope of the compensation act, unless, independently of the alleged agreement, the compensation act applied to the

situation. And if the statute applies to the situation (a local matter by reason of the non-maritime character of service and employment), then it makes no difference whether the statute is a so-called elective or so-called compulsory act; in either case its exclusive feature would bar the remedy in admiralty.

The supreme court of the state of Washington recognizes the fallacy of the foregoing argument of the defendant in error in the following terms (*Zahler v. Department of Labor and Industries*, 217 Pac. 55, 60):

> "Some contention is made that the language of the decision in the *Rohde* case, above quoted, lends support to the view that it was rested wholly upon the nature of the contract between Rohde and his employer, apart from the nature of the employment; that is, that their contract being made with reference to the Oregon workmen's compensation law, the contract became the sole source and support of the employer's contention that Rohde had no right of recovery in the courts.
>
> "If this argument be sound, then the contract of employment could be rendered effective to destroy Rohde's right of recovery in admiralty and confer jurisdiction upon a state tribunal, even if Rohde's employment had been of such a pure maritime nature

> as to make the admiralty jurisdiction over the question of his right to recover for injury exclusive; that is, the contract would in effect confer jurisdiction upon a state tribunal which would have no jurisdiction over the subject matter. * * * We think it hardly possible that the court intended to hold that Rohde and his employer could, by their contract alone, effectually confer jurisdiction over the subject matter in question upon the state tribunal, nor even by their contract submit their persons to the jurisdiction of the state tribunal unless the state tribunal did in fact have by law jurisdiction over the subject-matter; * * *"

This elementary doctrine that consent cannot confer jurisdiction is once more laid down in the recent case of *Panama R. Co. v. Johnson*, 289 Fed. 964, 982, where the circuit court of appeals for the second circuit says:

> "Where a court has no jurisdiction of the subject-matter, it cannot be conferred by consent of the parties."

Citing a number of United States Supreme Court decisions.

The argument that the federal courts are deprived of jurisdiction *by private contract* is fully answered by the foregoing. But it may be said in addition that that argument clashes with the elementary rule that parties cannot by private

contract oust courts of jurisdiction, and that ousting the federal court of jurisdiction in the *Rohde* case was not based on the *contract* but on the *statute.*

> "The *statute of the state applies* and defines the rights and liabilities of the parties." (*Rohde* case, 66 L. Ed. 321, 324).

If the federal court had jurisdiction, Rohde might sue there notwithstanding any private contract to the contrary; but otherwise, if a statute prevented his doing so. It was for the reason that the *statute* applied that the court said,

> "* * * he cannot recover damages in an admiralty court" (66 L. Ed. 321, 325).

The argument of the defendant in error on the *Rohde* case may be summarized as follows: The federal court, which *has* jurisdiction of the subject-matter, is by *private* contract *ousted* of jurisdiction; and by that same *private contract* jurisdiction is conferred upon the body administering the Oregon state compensation act, although in the absence of that private contract it has no jurisdiction over the subject-matter, nor does the legislature have the power to give it such jurisdiction. In other words, the defendant in error argues that the parties can do to the general admiralty law by private contract what the legislature cannot do, although the latter attempted to put shipbuilding under the compensation act.

It will be agreed that if that is the law, viz., if the *Rohde* case overrules the two immemorial rules of law (1) that a court cannot be ousted of jurisdiction by private contract, and (2) that consent of the parties cannot confer jurisdiction on a tribunal which, in the absence of the consent, has no jurisdiction over the subject-matter, —if that is the law of the *Rohde* case, then it will be agreed that the Supreme Court of the United States has, *without mention*, striken from the books two fundamental doctrines.

On the contrary, it is clear that the *Rohde* case rests squarely on the *principle* expressly announced in it and restated in the later decisions (66 L. Ed. 321, 324):

> "that as to certain *local matters*, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state *statutes*. *The present case is controlled by that principle.* The *statute* of the state *applies* and defines the rights and liabilities of the parties." (Italics ours).

The court does *not* say, it is to be noted, that as to certain *local matters* the rules of the general maritime law may be modified by "private contract," but by "state statutes." Moreover, the court does not say that the *private contract* "applies and defines the rights and liabilities of the parties," but that "the *statute* of the state

applies and defines the rights and liabilities of the parties." In other words, it was within the power of the Oregon legislature to put shipbuilding, a *non-maritime* industry, under the compensation act, and, therefore, that act applied to the situation.

(3) *There is no Inherent Distinction Between a So-called Elective and So-called Compulsory Compensation Act, for the Reason That in a So-called Elective Act, the Elements of Compulsion Are Present and the Elements of Voluntary Contract Absent.*

In the third place, assuming for the moment that parties might voluntarily contract to extend the jurisdiction of a court or of a statute, the parties under a so-called elective compensation statute do not voluntarily contract, but the statute is imposed upon them in case they do not, within a specified time, affirmatively express their intention to stay out of the operation of the statute; and staying out from under the statute is burdened with such heavy penalties that the parties are, in practical effect, compelled to come within the statute. *This they do by merely maintaining silence and not by consciously contracting.* In other words, calling these statutes "elective" is a misnomer, for in their practical operation they are just as compulsory as the so-called compulsory statutes. For this reason no distinction should be made on the

basis of whether the statute is called elective or compulsory. Bearing out this statement, it is said in 35 Harvard Law Review 745 (April, 1922):

> "Should a distinction be made where this incident is voluntarily assumed under an elective, and where it is imposed under a compulsory statute. It is arguable that under the former type of statute, the state has not changed admiralty law, but the parties have themselves voluntarily relinquished maritime rights and remedies and substituted those provided by statute. But the argument that there has been no interference by the state is considerably weakened not only by the fact that usually the parties are bound unless there is an affirmative rejection, but especially by the fact that the statutes provide as an alternative to acceptance by the employer a threatened deprivation of defenses, to some of which he is clearly entitled by admiralty law. At any rate the courts have regarded as immaterial the fact that the statute is elective rather than compulsory. Nor did the court lay stress on the elective feature of the statute in the *Rohde* case. This as a possible distinction between it and the *Jensen* case must therefore be discarded. * * *"

And to the same general effect is the follow-

ing quotation from 7 Minnesota Law Review 49, 51 (December, 1922):

> "An examination of the latter (elective compensation acts) shows that under most of them the parties are subject to their terms, unless they affirmatively reject them, and further, that, as an alternative to acceptance, the employer is threatened with a deprivation of his common law defenses of negligence of a fellow-servant, contributory negligence, and assumption of risk. In view of this, it hardly seems proper to say that the compensation provisions read into a contract of employment by the 'elective' acts constitute a contract between the parties, for a contract pre-supposes the right to exercise a free will. It would seem that what does happen is the creation of a legal obligation under certain circumstances, at most, a contract implied in law. If this be granted, then it follows irresistibly that the act can never be applied to vary the rights and liabilities that are definitely fixed by maritime law, whose uniformity is essential, because state law cannot contravene any superior maritime law. In short, the provisions of a compensation act, be it elective or compulsory, can never be read into a maritime contract."

Such being the theory of the so-called elective

statutes, the *Rohde* case cannot possibly be based on a voluntary contract conferring jurisdiction because there could, under the theory of the act, be no conscious voluntary contract with reference to the scope of the statute. At best, there was a contract implied in law, in other words, the injection of the statute into every contract of employment governed by it; and, of course, the statute could not be injected into the contract of employment in any greater or lesser scope than that given the statute by the legislature.

It is clear, of course, that wherever the *Rohde* case speaks of the contract of the parties, it means the voluntary express *contract of employment*, as distinguished from the implied obligation imposed by the compensation statute. Thus the words:

> "Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rule of the sea whose uniformity is essential * * *"

apply as well to a *contract of employment* made with reference to a compulsory statute as one made with reference to an elective statute.

This concludes the discussion of the *Rohde* case. That case fixes the boundary line for state jurisdiction apart from acts of Congress, and estab-

lishes the principle that the states may legislate as to local matters in the field of admiralty law. It only remains to ascertain whether Congress can enlarge the power of the states beyond the limitations of that decision.

II.

Congress Has No Power to Enlarge the Present Sphere of State Legislation in Admiralty Matters by Withdrawing Certain Classes of Cases From the Jurisdiction of the District Courts of the United States.

From the foregoing discussion of the *Rohde* case it is apparent that the decision in that case does not in the slightest modify the rule of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. The decision in the *Rohde* case merely places *non-maritime* employments performed on navigable waters, under state compensation acts. In the *Knickerbocker Ice Co.* case the attempt was made by Congress to place *maritime employments* on navigable waters under state compensation acts, and this court held that Congress was powerless to do so. The case of *Knickerbocker Ice Co. v. Stewart, supra*, rests upon the doctrine of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, this Court saying (64 L. Ed. 834, 840):

> "* * * Congress undertook * * * to save such statutes from the objections pointed

out by *Southern P. Co. v. Jensen.* It sought to sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, and remedies designed to provide compensation for injuries suffered by employees *engaged in maritime work.*

"And so construed, we think, the enactment is beyond the power of Congress." (Italics ours).

The *Jensen* case was reaffirmed by a unanimous court in *Great Lakes Dredge & Dock Co. v. Kierejewski,* decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, p. 490.

In the present action it is sought to collect industrial insurance premiums from the employers of workmen *engaged in maritime employment on navigable waters.* So long as the *Jensen* case and the *Knickerbocker Ice Co.* case are the law, that cannot be done.

In the act of June 10, 1922, amending sections 24 and 256 of the judicial code, Congress attempts to save to maritime claimants (other than the master and the crew) their rights and remedies under the workmen's compensation act of any state by depriving the lower federal courts of jurisdiction in those cases. That this is an attempt by Congress to delegate to the states a power which this court in the *Knickerbocker Ice Co.* case held Congress could not delegate is ap-

parent. If the states do not have original power, as decided in the *Jensen* case, and if Congress cannot delegate the power, as decided in the *Knickerbocker Ice Co.* case, then the states cannot exercise a power which they have not and cannot obtain, even though the federal government has attempted to withdraw from the field. Moreover, that Congress cannot withdraw the federal government from the field by the attempted device of depriving the lower federal courts of a maritime jurisdiction which they derive, not from Congress but from the Constitution (U. S. Const., Art. III, section 2), seems apparent. And, in addition to the supreme court of the state of Washington in this case, the lower federal courts so bold.

Farrell v. Waterman S. S. Co., 286 Fed. 284;

Farrell v. Waterman S. S. Co., 291 Fed. 604;

The Canadian Farmer, 290 Fed. 601.

Respectfully submitted,

ALFRED J. SCHWEPPE,

Amicus Curiae.